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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/659,967	09/11/2003	Duane G. Krzysik	KCC 4982.1 (K-C 19,834)	5034

321 7590 06/10/2005

SENNIGER POWERS LEAVITT AND ROEDEL  
ONE METROPOLITAN SQUARE  
16TH FLOOR  
ST LOUIS, MO 63102

EXAMINER
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VANIK, DAVID L

ART UNIT	PAPER NUMBER
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1615

DATE MAILED: 06/10/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

10/659,967

Applicant(s)

KRZYSIK ET AL.

Examiner

David L. Vanik

Art Unit

1615

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-27 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-27 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_.

## **DETAILED ACTION**

Receipt is acknowledged of the applicant's Preliminary Amendment filed on 3/21/2005.

### ***Claim Objections***

Claims 1-6, 11, 14-16, 19, 21, 23 are objected to because of the following informalities: According to MPEP 608.01, material in parenthesis is only proper when referring to elements in a figure. Appropriate correction is required.

### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-27 are rejected under 35 U.S.C. 102(b) as being anticipated by US patent 6,149,934 ('934).

'934 disclose a composition comprising from about 5 – 95 weight percent of an emollient, about 5 – 95 weight percent of a wax, and about 0.1 – 25 weight percent of a viscosity enhancer (abstract and column 2, lines 10-37). According to '934, mineral oil

Art Unit: 1615

is a suitable emollient (column 9, line 47), beeswax is a suitable structurant (column 10, line 22), and ethylene/vinyl acetate copolymer is a well-suited viscosity enhancer (column 10, line 64). Like the instant claims 7-9, the viscosity of the composition advanced by '934 is between about 50 – 50,000 centipose (column 12, lines 42-53). The composition set forth by '934 can also comprise a variety of other chemical agents, such as antifoaming agents and fragrances (column 11, lines 24-60).

The composition advanced by '934 can also comprise a surfactant, such as sorbitan monooleate, and a hydrophilic skin care active, such as glycerin (column 11, line 16; column 11, lines 59-60; and column 9, lines 21-22). In another embodiment, the composition can include 20 – 75 weight percent of a particulate material, such as calcium carbonate (column 7, lines 3-17).

The claims are therefore anticipated by US Patent 6,149,934 ('934).

Claims 1-14, 19-22 are rejected under 35 U.S.C. 102(b) as being anticipated by US patent 6,287,581 ('581).

'581 disclose a composition comprising 5 – 95 weight percent of emollients, 5 – 95 percent wax, a structurant, 1 – 25 weight percent of a viscosity enhancer, humectants, and 1 – 20 weight percent of a surfactant (abstract, column 3, lines 32-39, column 5, lines 18-32, and Claim 1). Specific components used in the invention advanced by '581 include: montan wax, a well known structurant (column 5, line 13); canola oil, a suitable emollient (column 4, line 47); ethylene/vinyl acetate copolymers, a viscosity enhancer (column 5, lines 16-17); sorbitan monooleate, a surfactant having an

Art Unit: 1615

HLB in the range of 3 to 6 (column 5, lines 1-2, column 7, lines 4-15); glycerin, a hydrophilic skin care active (column 5, line 7). The composition set forth by '581 can also comprise a variety of other chemical agents, such as antifoaming agents and fragrances (column 12, lines 11-44).

It is the examiner's position that, inherently, the composition advanced by '581 has a viscosity between 50 to about 50,000 centipose. Since the essential elements of the '581 composition are identical to the instant compositions (that is, 5 – 95 weight percent of emollients, 5 – 95 weight percent of a structurant, 1 – 25 weight percent of a viscosity enhancer), the composition would inherently have the same physiochemical properties as the compositions set forth in the instant application. As such, it is the examiner's position that the composition advanced by '581 anticipates the compositions enumerated in the instant claim set.

The claims are therefore anticipated by US Patent 6,287,581 ('581).

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

Art Unit: 1615

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 15-18, 23-27 are rejected under 35 U.S.C. 103(a) as being unpatentable over US patent 6,287,581 ('581) in view of US Patent 5,520,917 ('917).

The teachings of '581 are enumerated above. '581 does not teach a particulate material in a composition.

'917 teach cosmetic compositions comprising colored spherical fine particles (abstract and column 2, lines 40-54). The particles can comprise numerous chemical agents, such as silica and talc (column 3, lines 39 and column 4, line 39). According to '917, colored spherical particles can provide a cosmetic composition with enhanced coloring effect and give the composition an improved "feel" (column 2, lines 13-24). Because the use of particulate material, such as talc or silica, can advantageously improve the coloring and feel of cosmetic compositions, one of ordinary skill in the art would have been motivated to add particulate material to the cosmetic composition advanced by '581. Based on the teachings of '917, there is a reasonable expectation that adding silica or talc particles to the composition of '581 would result in a cosmetic composition with improved feel and color. As such, it would have been obvious to one of ordinary skill in the art at the time the invention was made to add silica or talc particles to the composition advanced by '581 in view of the teachings of '917.

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. US Patent 6,217,890 is cited as a patent of interest in its disclosure of a composition comprising an emollient, a structurant, and a viscosity enhancer.

### ***Correspondence***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to David L. Vanik whose telephone number is (571) 272-3104. The examiner can normally be reached on Monday-Friday 8:30 AM - 5:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Carlos Azpuru, can be reached at (571) 272-0588 . The fax phone number for the organization where this application or proceeding is assigned is (571) 273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Application/Control Number: 10/659,967

Page 7

Art Unit: 1615

David Vanik, Ph.D.

Art Unit 1615

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